

BEFORE THE
FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
A PETITION FOR DECLARATORY RULING)
STATE OF WASHINGTON, DEPARTMENT)
OF NATURAL RESOURCES,)
Petitioner,)
v.)
JAMES M. PETRA,)
Respondent.)

FPAB No. 79-1

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND BINDING
DECLARATORY RULING

This matter, a petition for declaratory ruling under RCW 34.04.080 of the Administrative Procedure Act, came before the Forest Practices Appeals Board, upon the following:

1. Petition for Declaratory Ruling, filed October 22, 1979.
2. Stipulation of Facts and the stipulated exhibits attached thereto filed December 4, 1979.
3. Memorandum of Authorities of Department of Natural Resources, filed December 4, 1979.

1 4. Respondent's Hearing Brief, filed December 5, 1979.

2 A hearing was convened before the Forest Practices Appeals Board,
3 Axel C. Julin, Chairman, Robert A. Smart and Thomas O. Wimmer,
4 Members, at Lacey, Washington on December 7, 1979. Hearing Examiner
5 William A. Harrison presided. Legal argument was advanced by Nixon
6 Handy, Assistant Attorney General, attorney for petitioner, Department
7 of Natural Resources, and by Joseph P. Enbody attorney for respondent,
8 James M. Petra. Members of the Forest Practices Appeals Board
9 directed certain questions to the parties which were transcribed and
10 provided to counsel, who filed in response:

11 1. Supplemental Memorandum of Department of Natural Resources,
12 filed February 7, 1980.

13 2. Petra's memorandum in response to inquiry from the Forest
14 Practices Appeals Board, filed February 8, 1980.

15 3. Supplemental Stipulation of Facts and Exhibits, filed March 10,
16 1980.

17 Thereafter, by Order of the Appeals Board, the hearing was
18 re-opened before Robert A. Smart and Cliff A. Barlament, Members,
19 convened at Chehalis on November 18, 1980. Hearing Examiner William
20 A. Harrison presided. Petitioner was represented by Nixon Handy,
21 Assistant Attorney General and respondent was represented by his
22 attorney, Joseph P. Enbody. Witnesses were called and testified,
23 exhibits were admitted.

24 Having reviewed the Petition and Stipulated Facts, having examined
25 the exhibits and heard or read the testimony and argument of counsel,

26 FINAL FINDINGS OF FACT, CONCLUSIONS
27 OF LAW AND BINDING DECLARATORY RULING - 2

1 having viewed the site in question and being fully advised, the Forest
2 Practices Appeals Board hereby enters the following

3 FINDINGS OF FACT

4 I

5 This matter concerns 160 acres of land in rural Lewis County. On
6 July 21, 1975, the landowners, Willard W. Latimer and Lee Roy Justice
7 (Latimer and Justice Logging) applied to the State Department of
8 Natural Resources (DNR) under the Forest Practices Act of 1974,
9 chapter 76.09 RCW, for approval to clearcut timber from 124 acres.
10 Within that application Latimer and Justice specified that they did
11 not intend to convert the land to a use other than commercial timber
12 production and set forth a method of reforestation consisting of the
hand planting of seedlings. The DNR approved this application on July
14 28, 1975.

15 Within one year, by July 14, 1976, Latimer and Justice completed
16 the clearcut of timber from the 124 acres.

17 II

18 Following the clearcut timber harvest, Latimer and Justice neither
19 prepared the site for reforestation nor reforested it. Rather, after
20 approximately six months, they sold the entire 160 acres to James M.
21 Petra, respondent herein, on January 7, 1977. Petra knew at the time
22 of purchase that the 124 acres had been clearcut by Latimer and
23 Justice within the preceeding two years.

24 Neither the deed from Latimer and Justice, nor the title insurance
25 report nor the land title records of the Lewis County Auditor recited

27 FINAL FINDINGS OF FACT, CONCLUSIONS
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1 any obligation to reforest the clearcut land. Petra had no actual
2 knowledge, at the time of purchase, of the approved harvest
3 application of Latimer and Justice on public file with the DNR.

4 Petra neither prepared the clearcut land for reforestation nor
5 reforested it. Instead, Petra surveyed the 160 acres, including the
6 clearcut 124 acres, into 32 tracts of 5 acres each. Of these, 15
7 tracts were sold to third parties prior to the commencement of this
8 petition proceeding. This left Petra in ownership of 85 contiguous
9 acres.

10 III

11 This proceeding applies only to the clearcut (preponderant)
12 portion of the 85 acres owned by Petra at the commencement of this
proceeding.

14 IV

15 The parties request this Appeals Board to declare under the facts
16 presented whether respondent Petra is obligated to undertake site
17 preparation and reforestation on the subject land to the standards of
18 the Forest Practices Act, 76.09 RCW, and supporting rules and
19 regulations. The parties have stipulated that the Appeals Board's
20 determination in this matter will be binding upon them, subject to
21 right of appeal.

22 V

23 Any Conclusion of Law which should be deemed a Finding of Fact is
24 hereby adopted as such.

25 From these Findings the Board comes to these

27 FINAL FINDINGS OF FACT, CONCLUSIONS
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CONCLUSIONS OF LAW

This matter presents the following issues which determine the ultimate issue of whether respondent, Petra, is obligated to undertake reforestation:

- 1) Who bears the reforestation obligation?
- 2) What is the source of the reforestation obligation?
- 3) Can there be release or exclusion from the reforestation obligation?
- 4) Should there be abstention in enforcement of the reforestation requirement?

I

Who bears the reforestation obligation? The Forest Practices Act, chapter 76.09 RCW (hereinafter "Act") contains the following at its outset:

76.09.010 LEGISLATIVE FINDING AND DECLARATION.

(1) The legislature hereby finds and declares that the forest land resources are among the most valuable of all resources in the state; that a viable forest products industry is of prime importance to the state's economy; that it is in the public interest for public and private commercial forest lands to be managed consistent with sound policies of natural resource protection; . . .

(2) The legislature further finds and declares it to be in the public interest of this state to create and maintain through the adoption of this chapter a comprehensive state-wide system of laws and forest practices regulations which will achieve the following purposes and policies:

(a) Afford protection to, promote, foster and encourage timber growth, and require such minimum reforestation of commercial tree species on forest lands as will reasonably utilize the

1 timber growing capacity of the soil following
2 current timber harvest;
3 RCW 76.09.010. (emphasis added)

4 The Act then goes on to require:

5 After the completion of a logging operation,
6 satisfactory reforestation as defined by the
7 rules and regulations provided by the board shall
8 be completed within three years . . .
9 RCW 76.09.070. (emphasis added)

10 Neither the Act, nor rules implementing it, identify specific
11 classes of persons who are, or who are not, responsible for conducting
12 this reforestation. The two passages from the Act, RCW 76.09.010 and
13 .070 quoted above, must therefore be read as a whole giving effect to
14 all of the language used so as to reach a conclusion which advances
15 the overall legislative purpose. Burlington Northern v. Johnston, 89
16 Wn2d 321, 572 P.2d 1085 (1977), Weyerhaeuser Co. v. Dept of Ecology 86
17 Wn2d 310, 545 P.2d 5 (1976) and State v. Purkes, 49 Wn.2d 664, 306
18 P.2d 205 (1957).

19 Under RCW 76.09.010, above, the legislature declares that the
20 forest land resource is "valuable" and "of prime importance to the
21 state's economy." The declaration is further made that "commercial"
22 forest lands are to be soundly managed, and that it is in the public
23 interest to require reforestation of "commercial" tree species. We
24 conclude that under RCW 76.09.070, above, the one responsible for site
25 preparation and reforestation is the one entitled to the economic
26 benefit from the increased value resulting from the commercial
27 reforestation. On the facts of this case, Petra became responsible
28 for site preparation and reforestation at the moment he acquired the

1 forest land in question.

2 II

3 What is the source of the reforestation obligation? Petra
4 contends that he could not become responsible for reforestation
5 because he had no actual knowledge of that responsibility at the time
6 he purchased the subject land. He draws analogy to the private law
7 principle of the bona fide purchaser who is unapprised by deed, record
8 title, title insurance report or otherwise of a defect in title. This
9 analogy is inapposite. The responsibility for reforestation is
10 imposed upon Petra by the Forest Practices Act directly as set forth
11 in Conclusion of Law I above.

12 Prospective purchasers of logged forest land can inspect the land,
13 inquire of the seller or inspect the approved harvest applications on
14 public file with DNR to determine if logging has occurred since the
15 effective date of the Act, January 1, 1975, so as to be within the
16 Act's reforestation requirements. Petra in fact knew that the logging
17 had occurred on the land in question since January 1, 1975. It is not
18 this actual knowledge, however, nor actual knowledge of the terms of
19 the Act that governs. Rather it is the operation of the Act, where
20 logging has in fact occurred since January 1, 1975, which imposes the
21 responsibility to reforest upon Petra.

22 Legislative Recommendations

23 Although the Act and its reforestation requirements are effective
24 when enacted, even without actual knowledge of the reforestation
25 requirements by each citizen, a means to impart actual knowledge would

1 be desirable. One such means would be to amend RCW 76.09.060(6) to
2 provide for the renewal of an application when there are outstanding
3 obligations or the posting of a compliance bond similar to that
4 provided by WAC 222-20-010(6):

5 WAC 222-20-010(6)

6 (6) Transfer of the approved application or
7 notification to a new landowner, timber owner or
8 operator requires written notice by the original
9 landowner or applicant to the Department and should
10 include the original application or notification
11 number. In the case of a transfer of an application
previously approved without the landowner's signature
the new timber owner or operator must submit a bond
securing compliance with the requirements of the
Forest Practices Regulations as determined necessary
by the Department.

12 Another means would be to require the seller to list Title 76
13 obligations on a tax affidavit form similar to the one proposed by
14 Substitute House Bill No. 810 which was considered in the last
15 legislative session.

16 III

17 Has there been release or exclusion from the reforestation
18 obligation?

19 Essentially the only means in this case to release the
20 reforestation obligation is the conversion of the cut-over land to a
21 use other than commercial timber production. RCW 76.09.060(3). If
22 the original application had shown intention to convert the forest
23 land to other uses, Petra would have been given three years to have
24 completed the conversion before the reforestation requirements became
25 applicable to the lands not converted. The completion of the timber
harvest would have been deemed conversion of the lands to another use

for the purpose of chapter 84.33 RCW. (The Timber and Forest Tax Act.)

In this case the application does not state that any land covered by the application will be or is intended to be converted. The law (RCW 76.09.060(3)) provides:

Failure to comply with the reforestation requirements contained in any final order or decision shall constitute a removal from classification under the provisions of RCW 84.33.140. . . and, if possible, shall subject such lands to the payments and/or penalties resulting from such removals or changes. . .

The Appeals Board is concerned that Petra was not given and may have been denied an opportunity to submit a new application for the purpose of revising the original application submitted by Latimer and Justice. Both parties have agreed that Petra was not aware of the reforestation obligation at the time he purchased the land. The DNR has stated that it considers a landowner's management objectives to the greatest extent permitted by law. The evidence indicates that at the time the DNR first notified Petra of the reforestation obligation, October 31, 1977, Petra had already shown his intent to convert part of the property to some use other than commercial timber production. Petra has indicated that broadcast burning and some of the planting is not compatible with his development plan. The need to make significant changes in the original reforestation plan was obvious. Reforestation is a forest practice. Both the law, RCW 76.09.060(5), and the original application state a new application is needed when significant changes regarding a forest practice are made in previously approved applications.

1 The intent to convert is supported by (1) the 5-acre subdivision
2 which has been platted and recorded, (2) the fact that the land in
3 question is now being assessed at its equalized market value rather
4 than as forest land, (3) the assessed valuation itself, (4) devel-
5 opment roads along lot boundaries as provided for by the plat, (5) the
6 cleanup of logging debris by Petra specifically for development
7 purposes and (6) the sale of 15 of the 32 five acre lots.

8 The selling of 5 acre lots to individuals may or may not
9 constitute a conversion. Assessment values formulated by Lewis County
10 show a significant increase in per acre land values as a tract is
11 subdivided. There is a very significant difference between the value
12 of 15 acre tracts, and 5 acre tracts. Unit costs of growing and
13 harvesting timber increase in a similar manner. It is indicated that
14 at some point the cost of land, property and excise taxes, and the
15 growing and harvesting of timber may make it impossible to raise timber
16 at a profit without subsidy. In such cases it is questionable if
17 these small ownerships can be classified as commercial forest lands
18 even though they are capable of growing commercial size timber. The
19 law almost demands that regulations specify a minimum acreage for
20 reforestation if its stated purpose of promoting efficiency by
21 permitting maximum operating freedom is to be fulfilled. RCW
22 76.09.010(2)(d).

23 The setting aside of one acre in five for homes, outbuildings,
24 garden, etc. as possibly suggested by the DNR, would constitute a
25 significant conversion to a use other than commercial timber
26 production.

1 The specification used in the new improved road constructed by
2 Petra specifically to develop the subdivision appear to be
3 incompatible with those provided for Forest Practices by WAC
4 222-24-010. The land occupied by this road is considered conversion
5 to a use incompatible with timber growing.

6 The importance of defining commercial forest land is indicated by
7 the legislative declaration which specifically refers to "private
8 commercial forest land to be managed." RCW 76.09.010(1). The
9 subsequent purposes and policies relate minimum reforestation with the
10 profitable growing and harvesting of timber and the need for
11 intergovernmental coordination and cooperation. In the case of
12 conversions RCW 76.09.060(3) speaks in terms of commercial timber
13 production and provides for some coordination with the forest tax
14 laws. The timber and forest land law is presently dependent upon the
15 Forest Practices Act for definitions of "merchantable stand of timber"
16 and "adequate stocking" in defining forest land. RCW 84.33.130(3)(a).

17 The definition of "forest land" (RCW 76.09.020) is not a suitable
18 guideline for determining applicable reforestation requirements. It
19 lacks acreage guidelines and does not take into consideration the cost
20 of growing timber. Stumpage returns over a rotation must be more than
21 just enough to offset harvesting and transportation costs. Stumpage
22 returns from commercial forest lands should be sufficient to at least
23 provide for the cost of growing the timber, taxes and a measurable
24 profit. RCW 84.33.071(3) indicates these costs are not generally
25 considered in determining residual stumpage values.

26 The law provides (RCW 76.09.070) that reforestation requirements

1 will be defined by the rules and regulations. The law provides (RCW
2 76.09.040) that such regulations shall give consideration to all
3 purposes and policies set forth in RCW 76.09.010. The evidence
4 indicates that Petra is proceeding to develop the subdivision as he
5 may have planned prior to his awareness of an outstanding
6 reforestation obligation. An extension time is indicated. Although
7 very little of the 85 acres may be released or excluded from the
8 reforestation obligation at this time, continued progress in the
9 development and sale of 5 acre lots may reduce or eliminate this
10 obligation during the extended period. Regulations applicable to
11 small land owners need to be promulgated. The selling of 85 acres in
12 one block would not in itself eliminate the outstanding reforestation
obligation.

14 ADMINISTRATIVE RECOMMENDATIONS

15 The evidence in this case indicates there may be a need for better
16 communication between the Department of Natural Resources, Department
17 of Revenue and the counties in (1) the evaluation of conversions, (2)
18 declassification of forest lands and (3) the application of
19 compensating tax payments.

20 IV

21 Should there be abstention in enforcement of the reforestation
22 requirement?

23 It is the decision of the Appeals Board that the DNR should
24 abstain for two years from any action to further enforce the
25 outstanding reforestation obligation.

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1 This decision is based upon the following:

2 1. The Appeals Board agrees with the DNR statement, "The rules
3 and regulations largely view reforestation from the perspective of the
4 industrial forest designed for the commercial production of timber.
5 The regulations do not specifically provide for reforestation on
6 non-industrial forest lands." New rules and regulations responsive to
7 these needs need to be promulgated by the Forest Practices Board.

8 2. Petra would have been allowed an additional year to complete
9 the reforestation obligation if a new application had been filed to
10 show (1) intent of conversion and (2) to modify original reforestation
11 plan (WAC 222-20-050).

12 3. A projection of principals as related to Urban Development
13 (WAC 222-34-050) in the absense of applicable guidelines for a partial
14 conversion of a subdivision.

15 4. The span of time between October 22, 1979, the date of the
16 petition for declaratory ruling, and the date of this decision.

17 V

18 Any Finding of Fact which should be deemed a Conclusion of Law is
19 hereby adopted as such.

20 From these Conclusions the Board enters this

21 DECLARATORY RULING

22 It is the ruling of the Appeals Board that Petra became
23 responsible for site preparation and reforestation at the moment he
24 acquired the forest land in question.

25 It is the ruling of the Appeals Board that Petra is not obligated

1 to undertake site preparation and reforestation on the subject land if
2 he submits an amended application to the Department of Natural
3 Resources showing:

4 1. Intent to convert to uses other than commercial timber
5 production.

6 2. A site plan showing intended subdivision and improvements.

7 3. A date for sale of all five acre tracts into individual
8 ownership (maximum five acres contiguous ownership) not to exceed two
9 years from the date of approval of the application by the Department
10 of Natural Resources.

11 Provided; however, that the application shall contain a condition that
12 no three month period shall expire without sale of individual five
13 acre lots or physical activity showing a conversion trend until such
14 time as all physical improvements are made according to the site
15 plan. Unless this condition is breached, no site preparation or
16 reforestation shall be required during the above two year period.

17 DONE at Lacey, Washington, this 16TH day of December, 1980.

18 FOREST PRACTICES APPEALS BOARD

19
20 Robert A. Smart
21 ROBERT A. SMART, Chairman

22 Cliff A. Barlament
23 CLIFF A. BARLAMENT, Member
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27 FINAL FINDINGS OF FACT, CONCLUSIONS
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